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**Prime Flight Aviation Services, Inc. and International Brotherhood of Electrical Workers, Local 1430**  
**Petitioner.** Case 02–RC–186447

January 29, 2019

**DECISION ON REVIEW AND ORDER**

BY CHAIRMAN RING AND MEMBERS MCFERRAN  
AND EMANUEL

The issue in this case is whether the Employer’s operations at Westchester County Airport (HPN) are subject to the Railway Labor Act (RLA) or to the National Labor Relations Act (the Act). The Regional Director concluded that the Employer’s HPN operations are subject to the Act and directed an election. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board (Board)’s Rules and Regulations, the Employer filed a timely request for review. While the request was pending, the United States Court of Appeals for the District of Columbia issued a decision criticizing the National Mediation Board (NMB) for recent decisions, including decisions relied upon by the Regional Director in her Decision and Direction of Election, that departed from longstanding NMB precedent without explanation. *ABM Onsite Services—West*, 849 F.3d 1137 (D.C. Cir. 2017). The Board subsequently referred several cases, including this case, to the NMB for further consideration in light of the D.C. Circuit’s decision. On February 26, 2018, the NMB issued an advisory opinion in *ABM Onsite* overruling the recent decisions criticized by the D.C. Circuit. On August 22, 2018, the NMB issued an advisory opinion stating its view that the Employer’s HPN operations are subject to the RLA.

The Board has delegated its authority in this proceeding to a three-member panel.

For the reasons discussed below, we agree with the NMB that the Employer’s HPN operations are subject to the RLA. We therefore grant the Employer’s request for review, dismiss the petition, and vacate the Union’s certification.

**Background**

Section 2(2) of the Act provides that the term “employer” shall not include “any person subject to the Railway Labor Act.” 29 U.S.C. § 152(2). Similarly, Section 2(3) of the Act provides that the term “employee” does not include “any individual employed by an employer subject to the Railway Labor Act.” 29 U.S.C. § 152(3). The RLA, as amended, applies to

every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner or rendition of his service.

45 U.S.C. § 151 First and 181.

When an employer is not itself a carrier, the NMB applies a two-part test to determine whether it nonetheless has jurisdiction over that employer. First, the NMB considers whether the work the employer performs is traditionally performed by carrier employees. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. Both parts of the test must be met for the NMB to assert jurisdiction. In determining whether the second part of the test is satisfied, the NMB has traditionally considered six factors: (1) the extent of the carrier’s control over the manner in which the company conducts its business, (2) the carrier’s access to the company’s operations and records, (3) the carrier’s role in personnel decisions, (4) the degree of carrier supervision of the company’s employees, (5) whether company employees are held out to the public as carrier employees, and (6) the extent of carrier control over employee training. See, e.g., *Air Serv Corp.*, 33 NMB 272, 285 (2006).

In 2013, the NMB began emphasizing the third of these six factors, carrier control over personnel decisions (particularly discipline and discharge), and it issued a number of advisory opinions declining to assert jurisdiction where such evidence was lacking. See, e.g., *Huntleigh USA Corp.*, 40 NMB 130, 137 (2013). The Board essentially followed suit, in light of its policy to grant “substantial deference” to NMB advisory opinions regarding RLA jurisdiction.<sup>1</sup> Thus, the Board asserted jurisdiction in cases where the NMB declined to do so under its rebalanced test. See, e.g., *Airway Cleaners, LLC*, 362 NLRB 760, 760 fn. 2 (2015). In addition, consistent with its longstanding practice, the Board asserted jurisdiction, without referral, in cases that were factually similar to cases in which the NMB had declined jurisdiction.<sup>2</sup> See, e.g., *Allied Aviation Service Co. of New Jer-*

<sup>1</sup> See, e.g., *DHL Worldwide Express*, 340 NLRB 1034, 1034 (2003).

<sup>2</sup> See *Spartan Aviation Industries*, 337 NLRB 708, 708 (2002) (“[T]he Board . . . will not refer a case that presents a jurisdictional claim in a factual situation similar to one in which the NMB has previously declined jurisdiction.”).

sey, 362 1392, 1392 (2015), enfd. 854 F.3d 55 (D.C. Cir. 2017), cert. denied 138 S.Ct. 458 (2017).

#### Procedural History

The Employer provides various ground-handling and terminal services at airports throughout the United States. At HPN, the Employer contracts with JetBlue Airways (JetBlue) and AFCO AvPORTS Management, LLC (AvPORTS). On October 18, 2016, the Petitioner filed a petition seeking to represent a unit of all full-time and regular part-time baggage handlers, wheelchair agents, and line queue agents employed by the Employer at HPN. The Employer argued that the petition should be dismissed, reasoning that it is controlled by common air carriers, including JetBlue, subject to the jurisdiction of the RLA and that, therefore, the Board lacks jurisdiction under Section 2(2) of the Act. The Petitioner contended that the Employer is not directly or indirectly controlled by common air carriers subject to the RLA, and therefore, the Board has jurisdiction. After a hearing the Regional Director issued a Decision and Direction of Election on November 4, 2016, asserting jurisdiction based on her finding that, similar to recent NMB cases, the common air carriers do not exercise meaningful control over the Employer, particularly its personnel decisions. Thereafter, the Employer filed a timely request for review.

On March 7, 2017, while the Employer's request for review was pending before the Board, the United States Court of Appeals for the District of Columbia issued its decision in *ABM Onsite Services-West, Inc. v. NLRB*, 849 F.3d 1137 (D.C. Cir. 2017), which criticized the post-2013 NMB cases, including those relied on by the Regional Director in the Decision and Direction of Election, as an unexplained departure from longstanding NMB precedent applying the NMB's six-factor test for determining carrier control over non-carrier employers. *Id.* at 1144–1146. In remanding the case, the court instructed the Board to either “attempt to offer its own reasoned explanation” for the NMB's departure from precedent or to refer the matter to the NMB for an explanation of its change of course. On remand, the Board referred the case to the NMB, which issued an advisory opinion reaffirming its traditional six-factor carrier control test in which “[n]o one factor is elevated above all others” and overruled cases—including those relied on by the Regional Director—requiring carrier control over personnel decisions. *ABM-Onsite Services*, 45 NMB 27, 34–35 fn. 2 (2018). Applying the six-factor carrier control test, the NMB found that the employer's operations were subject to the RLA. *Id.* at 35–36. Consistent with the Board's policy of giving substantial deference to NMB's advisory opinions, the Board deferred to the NMB's opinion, find-

ing it was supported by the record in that case. *ABM Onsite Services-West, Inc.*, 367 NLRB No. 35 (2018).

On May 18, 2017, the Board requested that the NMB study the record in this case in light of the D.C. Circuit's decision in *ABM Onsite Services-West* and determine the applicability of the RLA to the Employer's operations at HPN. Following the issuance of its advisory opinion in *ABM-Onsite Services*, the NMB issued an advisory opinion on August 22, 2018, in which it applied its six-factor carrier control test and found that the Employer's operations at HPN are subject to the RLA. *PrimeFlight Aviation*, 45 NMB 129 (2018).

In light of the NMB's decision to overrule cases the Regional Director relied upon in asserting Board jurisdiction and the NMB's advisory opinion asserting its jurisdiction over the Employer's HPN operations, we grant the Employer's Request for Review of the Regional Director's Decision and Direction of Election as it raises substantial issues warranting review.

#### Discussion

Having received the NMB's advisory opinion, we will give it the substantial deference the Board ordinarily accords such opinions. See *DHL Worldwide Express*, above. Considering the record in light of the NMB's opinion, we find that the Employer's baggage handlers, wheelchair agents, and line queue agents employed at HPN perform work that has traditionally been performed by air carrier employees, and that JetBlue exercises substantial control over the Employer's HPN operations under the NMB's traditional six-factor carrier control test.<sup>3</sup>

Under factor one of the carrier control test, the record supports the NMB's finding that JetBlue controls the manner in which the Employer conducts its business, supporting RLA jurisdiction. JetBlue's schedule dictates the scheduling of the Employer's employees, JetBlue instructs the Employer on a daily basis regarding the work hours needed from the Employer's employees, and the Employer must seek JetBlue's permission before exceeding the maximum daily service hours provided for by the parties' contract. JetBlue's supervisors coordinate with the Employer's supervisors each day to ensure wheelchair and baggage services are provided. And JetBlue reports performance problems to the Employer's supervisors and managers, and the Employer's general manager is responsible for addressing these concerns and

<sup>3</sup> Based on its finding that JetBlue exercises sufficient control over the Employer to establish RLA jurisdiction, the NMB found it unnecessary to address whether AvPORTS is a common carrier. We agree that it is unnecessary to reach this issue.

communicating the steps the Employer has taken to remedy them.

There is also evidentiary support for the NMB's determination that the third carrier control factor weighs in favor of RLA jurisdiction because JetBlue exerts significant control over the Employer's personnel decisions. With respect to promotions, the Employer's general manager testified that the Employer created supervisor positions at the request of JetBlue and AvPORTS, requested their feedback on candidates, and ultimately filled the positions with the individuals the carriers had requested. JetBlue also has the right to require removal by the Employer from its operations of any employees that it finds unacceptable under its contract with the Employer, and the record contains two examples of JetBlue exercising that right. In one case, JetBlue provided the Employer with photographs showing an employee offering one customer an unauthorized discount and pocketing a cash payment for another customer's overweight bag. In another case, JetBlue requested that the Employer terminate an employee who threatened a JetBlue employee. The Employer complied with JetBlue's requests without conducting an independent investigation into the alleged misconduct. The Employer's division vice president testified that the Employer does not conduct investigations when customers require termination of an employee because the contract language leaves the Employer "no choice" in the matter. In addition, JetBlue also extends its "buddy pass" program to the Employer's employees, showing its control over employee benefits.

The record additionally sustains the NMB's findings that two of the remaining factors demonstrate that the Employer is subject to JetBlue's control.<sup>4</sup> JetBlue has access to the Employer's operations and records, insofar as JetBlue has the right to audit records if the audit is related to services provided, upon request the Employer must provide JetBlue with records relating to several important matters (workplace accidents and injuries, employee grievances, and employee discipline), JetBlue requires the Employer to provide regular reports documenting wheelchair "transactions," and JetBlue retains the right to audit records relating to employee training. And with respect to training, JetBlue trains one of the Employer's employees, who in turn trains the other employees working under the JetBlue contract, a circumstance the NMB has long found significant. See, e.g., *Bradley Pacific Aviation, Inc.*, 34 NMB 119, 131 (2007).

<sup>4</sup> The remaining factors—the degree of carrier supervision of the Employer's employees and whether the Employer's employees are held out to the public as carrier employees—do not support RLA jurisdiction.

Finally, we observe that the NMB's analysis in its advisory opinion closely tracks its analysis of the carrier control factors in an earlier case involving this Employer's operations at another airport. See *PrimeFlight Aviation Services, Inc.*, 34 NMB 175 (2007).

In sum, the record supports the NMB's finding that evidence bearing on four of the six traditional carrier control factors establishes that the Employer is controlled by JetBlue, and this finding is consistent with prior NMB precedent. Therefore, we agree with the NMB's determination that JetBlue exercises sufficient control over the Employer's operations at HPN to establish RLA jurisdiction. Accordingly, we shall vacate the certification and dismiss the petition.<sup>5</sup>

#### ORDER

IT IS ORDERED that the certification of representative issued November 28, 2016, is vacated and the petition is dismissed.

Dated, Washington, D.C. January 29, 2019

John F. Ring, Chairman

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

For the reasons stated in my dissenting opinion in *ABM Onsite Services-West, Inc.*, 367 NLRB No. 35, slip op. at 3–5 (2018), I believe that the National Mediation Board adopted its current jurisdictional test without engaging in the reasoned decision-making required by the Administrative Procedure Act. In particular, the NMB failed to address the dissenting arguments of Member Puchala, who also has dissented here. Instead of deferring to the NMB's jurisdictional determination as it did in *ABM Onsite*, supra, the Board should refer this case to the NMB again, so that agency may provide a sufficient

<sup>5</sup> Our dissenting colleague, relying on her dissent in *ABM Onsite Services-West, Inc.*, above, slip op. at 3–5, would not defer to the NMB's advisory opinion based on her belief that the NMB in its advisory opinion in *ABM-Onsite Services*, failed to provide a reasoned explanation for its reaffirmation of the traditional six-factor carrier control test. We disagree with that view for the reasons stated by the majority in *ABM Onsite Services-West, Inc.*, above, slip op. at 2 fn. 5. Accordingly, we reject our dissenting colleague's view that we should refer this case to the NMB again.

explanation of its decision either to adopt to the jurisdictional test applied here or to adhere to its prior test. As it stands, neither the NMB, nor the Board, have satisfied the APA's requirements. Accordingly, I dissent.

Dated, Washington, D.C. January 29, 2019

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Lauren McFerran, Member

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